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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1409

LONNIE NORTH ..... APPELLANT

VS.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR APPELLEES

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

OPINIONS BELOW

The first opinion of the Court of Appeals of Kentucky in this case, rendered August 12, 1974, is reported at 516 S.W.2d 103, and is printed in the Appendix at Page 62. The second opinion of the Court of Appeals of Kentucky on remand from this Court, rendered March 21, 1975, is unreported. A copy of the opinion appears in the Appendix at Page 63.

JURISDICTION

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1257 (2) (1970). Certiorari jurisdiction is conferred by 28 U.S.C. 1257 (3) (1970).

QUESTION PRESENTED

Whether the General Assembly of the Commonwealth of Kentucky has lawfully and constitutionally vested in a non-lawyer judge the power of presiding at a criminal misdemeanor trial held in the police court of a city of the fifth class.

A. Whether an individual charged with a criminal misdemeanor, where the possible punishment upon conviction may be imprisonment, is denied due process of law under the Fourteenth Amendment of the Federal Constitution when initially tried before a non-lawyer police court judge under Kentucky's two-tier misdemeanor court system.

B. Whether an individual charged with a criminal misdemeanor in a police court where the possible punishment upon conviction may be imprisonment, is denied equal protection of law under the Fourteenth Amendment of the Federal Constitution where the Kentucky General Assembly has established different statutory requirements in order to become a police court judge, depending upon the Kentucky constitutional class of city, based upon population size, over which the police court has jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions involved are the Sixth, Tenth and Fourteenth Amendments to the United States Constitution.

The state constitutional provisions involved are Sections 99, 100, 130, 139, 140, 142, 143, 156, 160 and 167 of the Kentucky Constitution.

The state statutes involved are Kentucky Revised Statutes 23.032, 26.010, 26.140, 26.150, 26.170, 26.190, 26.200, 81.010, 87.160 and 87.170(1).

STATEMENT OF THE CASE

The appellees accept as being substantially correct the appellant's statement of the case.

SUMMARY OF ARGUMENT

The Federal Constitution does not require a defendant accused of a criminal misdemeanor for which imprisonment may result if convicted, be tried by a lawyer judge. The Tenth Amendment of the Federal Constitution authorizes states to develop their own court system. The Commonwealth of Kentucky, through its constitution and General Assembly, has established a uniform police court system consisting in part of a non-lawyer judges.

The federal constitutional principle of "fundamental fairness" which universally focuses on rights basic to a fair trial for one accused of a wrongful act does not require a criminal misdemeanor case be heard before a lawyer judge. Due Process under the Fourteenth Amendment

of the Federal Constitution requires only that the tribunal hearing a case be neutral and detached. See especially *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). This Court has expressly recognized a non-lawyer's ability to think like a judge, determine difficult legal questions and to take action which directly affects an individual's liberty. *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972). The competency of a particular judge must be determined on a case by case basis, whether the judge is a lawyer or non-lawyer.

Under Kentucky's two-tier misdemeanor court system, an accused may challenge the decision of a police court whether the judge was a lawyer or non-lawyer by a consideration of right to the circuit court where the judge is required to be a lawyer. This right to a trial *de novo* is unconditional and exists even when a defendant seeks redetermination on questions of law. The two-tier system of courts simply acts as a guarantee for total relief, not possible relief based on the record in the police court, to any defendant who feels he has been denied in practice a fair trial in any police court in Kentucky, irrespective of whether the judge was a lawyer or non-lawyer.

The Kentucky General Assembly in the exercise of its legislative discretion has varied the qualifications required for police court judges, depending upon the population of the court's jurisdiction. The variance in the qualifications police court judges are required to meet, based upon the population size of the cities in which the judges serve, presents no discrimination against defendants tried before non-lawyer judges in violation of the Equal Protection Clause of the Fourteenth Amendment. The right to equal protection applies to the manner in which the law is applied to persons rather than geographical areas.

The statutory requirements for police court judges within the classification of cities set forth by the Kentucky General Assembly is a reasonable method for achieving the Commonwealth's legitimate objective of providing a fair, efficient and expeditious police court system for all its citizens. Sound reasons which adequately justify the differing requirements for police court judges in the six classes of cities in Kentucky are (a) the greater volume of court business in larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously, (b) lawyers with whom to staff the courts are more available in the larger cities, and (c) the larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts.

ARGUMENT

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY HAS LAWFULLY AND CONSTITUTIONALLY VESTED IN A NON-LAWYER JUDGE THE POWER OF PRESIDING AT A CRIMINAL MISDEMEANOR TRIAL HELD IN THE POLICE COURT OF A CITY OF THE FIFTH CLASS.

A. AN INDIVIDUAL CHARGED WITH A CRIMINAL MISDEMEANOR, WHERE THE POSSIBLE PUNISHMENT UPON CONVICTION MAY BE IMPRISONMENT, IS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WHEN INITIALLY TRIED BEFORE A NON-LAWYER POLICE COURT JUDGE UNDER KENTUCKY'S TWO-TIER MISDEMEANOR COURT SYSTEM.

The issue which the appellant raised in the state courts and which he now presents before this Court

is whether the General Assembly of the Commonwealth of Kentucky has lawfully vested in a judge not required to be a lawyer the power of presiding at a criminal misdemeanor trial held in the police court of a city of the fifth class. Appellant's contention is not simply that appellee Judge Russell has denied appellant a fair trial through judicial errors made in the consideration of this particular case, but instead the appellant argues that the inferior court system of Kentucky denies him due process in that a criminal misdemeanor trial presided over by *any* non-lawyer judge is inherently unfair and unconstitutional. Therefore, the appellant has not only the burden of establishing that his federal constitutional rights were violated in this specific instance; he must also demonstrate that such a denial is probable in all criminal cases which are to be heard by judges who are not lawyers. See *Estes* v. *State of Texas*, 381 U.S. 532, reh. den., 382 U.S. 875 (1965); *Re Murchison*, 349 U.S. 133 (1955). The key question, then, before this Court is whether the Federal Constitution *requires* that a defendant accused of a criminal misdemeanor, for which imprisonment may result if convicted, be tried before a lawyer judge.

There can be little doubt that the Tenth Amendment to the Federal Constitution authorizes the Commonwealth of Kentucky and every other state in the Union to develop its own court system. A principal responsibility under the state's police power is to enact "procedures for enforcing its laws." *Salsburg* v. *Maryland*, 346 U.S. 545, 550 (1954). While the Kentucky Constitution does not directly establish police courts, by Section 143 it expressly authorizes the General Assembly of the Commonwealth to do so; and in Sections 160 and 167 it specifies the terms of office

and provides for the election, replacement and removal of police judges.

Section 143 of the Kentucky Constitution states:

> *"Establishment and jurisdiction of.* A police court may be established in each city and town in this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have. The said courts may be authorized to act as examining courts, but shall have no civil jurisdiction: Provided, The general assembly may confer civil jurisdiction on police courts in cities and towns of the fourth and fifth classes, and in towns of the sixth class having a population of two hundred and fifty or more, which jurisdiction shall be uniform throughout the state, and not exceed that of justices of the peace."

Sections 160 and 167 of the Kentucky Constitution respectively state as follows:

> "§ 160. *Municipal officers; election and term of office; officers ineligible; 'fiscal officers.'* — The mayor or chief executive, police judges, members of legislative boards or councils of towns and cities shall be elected by the qualified voters thereof: Provided, The mayor or chief executive and police judges of the towns of the fourth, fifth and sixth classes may be appointed or elected as provided by law. The terms of office of mayors or chief executives and police judges shall be four years, and until their successors

shall be qualified; and of members of legislative boards, two years. When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of the said wards or districts; but when in any city of the first, second or third class, there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city; but other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the general assembly may, by a general law, provide; but when elected by the voters of a town or city, their terms of office shall be four years, and until their successors shall be qualified.

No mayor or chief executive or fiscal officer of any city of the first or second class, after the expiration of the term of office to which he has been elected under this Constitution, shall be eligible for the succeeding term. 'Fiscal officer' shall not include an auditor or assessor, or any other officer whose chief duty is not the collection or holding of public moneys. The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled.

* * * *

§ 167. *Terms of officers elected under old charters; when officers to be elected; police judges.* — All city and town officers in this state shall be elected or appointed as provided in the charter of each respective town and city, until the general election in November, eighteen hundred and ninety-three, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire; and at that election, and thereafter as their terms of office may expire, all officers required to be elected in cities and towns by this Constitution, or by general laws enacted in conformity to its provisions, shall be elected at the general elections in November, but only in the odd years, except members of municipal legislative boards, who may be elected either in the even or odd years, or part in the even and part in the odd years: Provided, That the terms of office of police judges, who were elected for four years at the August election, eighteen hundred and ninety, shall expire August thirty-first, eighteen hundred and ninety-four, and the terms of police judges elected in November, eighteen hundred and ninety-three, shall begin September first, eighteen hundred and ninety-four, and continue until the November election, eighteen hundred and ninety-seven, and until their successors are elected and qualified."

Toward the end provided by the Kentucky Constitution, the General Assembly, in Chapter 26 of the Kentucky Revised Statutes (KRS), has provided for a uniform police court system consisting in part of non-lawyer judges.

KRS 26.010 provides for police courts in cities of

every class and its jurisdictional parameters and states as follows:

> "Except as provided in KRS 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in cities of every class have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits."

Section 156 of the Kentucky Constitution divides all of the Commonwealth's cities into six classes according to population, which section reads:

> "§ 156. *Six classes; population determines classification; organization and assignment.* — The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor. The general assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after the organization of said town or city."

KRS 81.010 provides in relevant part as follows:
"Cities are classified as follows:

* * *

(5) Fifth class:

* * *

Lynch, Harlan County. . ."

Appellee Russell is the police court judge of this Kentucky city of the fifth class.

The statutory provisions stating the qualifications for the police court judges in the six classes of cities are as follows:

KRS 26.140. Police judge in cities of the first class:

"The judge of the police court in cities of the first class shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to KRS 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers."

KRS 26.150. Judge of police court in cities of the second class:

"(1) In cities of the second class the police court shall have one (1) judge. He shall receive an annual salary of not more than $21,000 to be fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one (1) month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five (25) years of age and has been a resident of the

city for at least four (4) years, and is an attorney at law.

(2) The provisions of this section shall not apply to persons who are serving as police judges on June 16, 1972, and who remain in the present position or who are continuously re-elected to the position without any lapse in service."

KRS 26.170. Police judge, third class cities; salary, qualifications:

"The police court in cities of the third class shall have one police judge. The judge shall enter upon the discharge of the duties of his office on the first Monday in January next after his election. He shall receive an annual salary of six thousand dollars unless the city legislative body fix such salary by ordinance in which event the salary shall not be less than two thousand four hundred dollars per annum. The salary will be paid in equal bimonthly installments out of the city treasury, and he shall receive no other compensation except the fees allowed to judges for holding examining trials. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless, at the time of his election, he is at least twenty-four years of age, is a qualified voter in the city, and has been an actual resident of the city for at least two years next preceding his election."

KRS 26.190. Police court and judge in cities of fourth class:

"The police court in cities of the fourth class shall

be held by a single police judge. He shall be elected by the voters of the city at the general election in November, or appointed by the city legislative body, as it may determine by ordinance enacted at least sixty days previous to the next November election. He shall hold his office for a term of four years. He shall take the oath required of circuit judges, and shall be a conservator of the peace. The compensation of the police judge shall be fixed by ordinance before his election or appointment. No person shall be eligible to be police judge unless he is at least twenty-four years of age and has resided within the limits of the city at least six months next preceding his election."

KRS 26.200. Police judge in cities of fifth and sixth classes:

"No person shall be eligible to be police judge in a city of the fifth or sixth class unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one."

Thus, it is clear that each city in Kentucky has the authority to set up a police court. In *Fay* v. *New York*, 332 U.S. 261 (1947), this Court upheld New York's "special" jury system, writing:

> "The function of the . . . Fourteenth Amendment . . . is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ . . . . [Courts] must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court has been careful not so to interpret upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." 332 U.S. 294.

Acknowledging the states' power to organize their own court systems, this Court further wrote in *Fay*:

> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations and practice." 332 U.S. 295.

Although addressing itself to the "special" jury system in New York City, this Court's language in *Fay* extends to the states' power to provide a judicial system which includes non-lawyer judges. A constitutionally necessary ingredient in any judicial system that is created is the availability of a fundamentally fair trial. And this right to a fundamentally fair trial extends to all criminal trials, regardless of the nature of the crime with which a defendant is charged. *Argersinger* v. *Hamlin*, 407 U.S.

25 (1972). But we do not believe the constitutional principle of "fundamental fairness", which universally focuses on rights basic to a fair trial for one accused of a wrongful act, *requires* a misdemeanor criminal case be heard before a lawyer judge.

The Fourteenth Amendment to the Federal Constitution requires that no state shall deprive any person of life, liberty, or property, without due process of law. Due process, relative to the tribunal hearing a case, usually has been considered to require only that the tribunal be *fair and impartial.* Citing *Re Murchison,* supra, the Kentucky Court of Appeals stated this proposition in rejecting contentions identical to those made by the appellant herein in *Ditty* v. *Hampton,* Ky., 490 S.W.2d 772 (1973). The allegation that a non-lawyer judge cannot be fair and impartial and preside over a fundamentally fair trial is simply that — an allegation. The mere statement that *a* non-lawyer is not a competent judge does not make *all* non-lawyer judges incompetent.

We concede in the present case the police judge erred. But the record of this case only shows this non-lawyer judge did not afford a fair trial to the appellant, not that *all* non-lawyer judges are unable to conduct a judicially fair trial. Again, the single question actually before the Court is whether power has been lawfully vested by the Kentucky General Assembly to police judges who are not lawyers, not whether that power has been constitutionally exercised. Does the Federal Constitution *require* a lawyer judge in order to guarantee a fundamentally fair trial?

One line of cases offered in support of the appellant's argument that a non-lawyer judge per se may not afford

a fundamentally fair trial to a criminally accused is based upon probable bias of the tribunal and not that the judges were non-lawyers. *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972) and *Tumey* v. *Ohio,* 273 U.S. 510 (1926). For this reason, these cases are inapposite to the true question at hand. For example, the problem existing under the facts developed in *Ward,* supra, were that under Ohio law, mayors were authorized to sit as judges in cases of ordinance violations and certain traffic offenses. This Court held that because fines levied in the mayor's court produced a substantial part of a village's income, an individual tried in a mayor's court denied him a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment. This case only supports the proposition that one has a fundamental right to a neutral and detached judge. Note that this Court in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) held that in a parole-revocation proceeding, due process required only a "neutral and detached" hearing body, members of which need not be judicial officers or lawyers.

This Court, in addition to *Ward* and *Morrissey,* also considered the importance of a neutral and detached judicial officer in *Shadwick* v. *City of Tampa,* 407 U.S. 345 (1972). In *Shadwick,* this Court unanimously upheld a Florida law by which court clerks, who were not attorneys or judges, determined probable cause for the issuance of arrest warrants for those charged with having breached municipal ordinances. Such a determination was deemed within the capabilities of the layman and not violative of due process. Mr. Justice Powell, writing the opinion of the Court, stated:

"We find no commandment in either term (magistrate and judicial officer), however, that all warrant authority must reside exclusively in a lawyer or judge." 407 U.S. 349.

Mr. Justice Powell went on to say in *Shadwick*:

". . . The substance of the Constitution's warrant requirement does not turn on the labeling of the issuing party. . . . Thus, an issuing magistrate must meet two tests. He must be *neutral and detached*, and he must be capable of determining whether probable cause exists for the requested arrest or search." (Emphasis supplied.) 407 U.S. 350.

The kinds of legal determinations a non-lawyer magistrate makes before issuing warrants are virtually synonymous with the great majority of legal questions decided in most police court cases. For instance, a warrant may only be issued upon sufficient application showing probable cause. The magistrate must determine:

a. the application and accompanying affidavit(s) comply with all statutory requirements as to form;

b. the actual description of persons, places and things is legally sufficient;

c. the allegations of information source, if other than personal knowledge, are sufficiently stated to satisfy the legal requirements regarding affidavits (akin to a proper foundation);

d. the allegations are properly in the affidavit, and

that they are not unidentified hearsay (akin to questions of admissibility);

e. the allegations are not legally stale;

f. that sufficient facts appear to demonstrate probable cause.

All of these decisions involve questions of law. Perhaps most fundamentally, the last requires a comprehensive knowledge of probable cause judicial decisions. The determination of probable cause is thought by many judges to be the most difficult question to regularly come before them. That concept is relevant to the issuance of warrants and to a determination to bind over a felony defendant for grand jury action on his case.

Thus, the non-lawyer magistrate, expressly approved by this Court in *Shadwick*, supra, is competent to find the required legal decisions, read and comprehend them, and apply them on a case by case basis. In short, this Court has expressly recognized a non-lawyer's ability to think like a judge, to determine difficult legal questions, and to take action which directly affects the individual's personal liberty.

Moreover, it was apparently argued in *Shadwick*, that this Court should make a per se invalidation of Tampa's warrant system on the ground that the issuing magistrate was not a lawyer or a judge. Note that it was not "lawyer judge" but "lawyer or judge." Even so, this Court specifically rejected any per se invalidation. This Court should reject any per se invalidation of a system of non-lawyer judges also.

This Court in *Shadwick* further recognized that a judge or lawyer would normally provide the most desirable review of warrant requests. The appellant herein exhaustively argues in support of his contention that police courts should be presided over by a lawyer judge, by referring to the judicial trend as evidenced by some several states having adopted lawyer judge provisions and the legal writers in the field of judicial reform who advocate this position. All of this lengthy argument does not address itself to the constitutional issues in this case but merely to the broad policy considerations as to what may be the more desirable inferior court tribunal. While we all, as attorneys, may be drawn to the ideal of having lawyer judges, this begs the question — what does the Constitution of the United States *require?* Even if this Court is persuaded that lawyer judges are to be preferred over non-lawyer judges, it should not strike down the entire inferior court system of Kentucky unless it is firmly convinced that the system is actually in violation of what the Constitution *requires;* for, as the Court stated in *Shadwick*:

> ". . . [O]ur federal system warns of converting desirable practice into constitutional commandment." 407 U.S. 353.

In the appellant's attempt to show this Court that a non-lawyer judge is in violation of the Constitution because he is per se unable to afford a fundamentally fair trial to one charged with a misdemeanor, the penalty for which may be incarceration, he argues that if, as held in *Argersinger* v. *Hamlin,* supra, due process requires that the accused be represented by legal counsel, it necessarily follows that due process requires that the court be presided

over by a lawyer. We agree with our Kentucky Court of Appeals who believed it does not so follow and rejected the allegation that the use of non-lawyer judges worked a denial of due process by stating in *Ditty* v. *Hampton,* supra, as follows:

> ". . . The function of the court is not to defend the accused, or to represent him, but to decide fairly and impartially. An accused needs counsel to defend him, as pointed out in *Gideon* v. *Wainwright,* because the government employs lawyers to prosecute him — because our system of criminal justice is an adversary system. But the judge is not one of the accused's adversaries, and is not there either to defend or prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge." 490 S.W.2d 775.

The principle that if there is no accompanying right to counsel the right to trial by jury becomes meaningless, cannot be reasonably further expanded to say that these two rights stated in the Constitution, mandate and constitutionally require that the judge must be a lawyer, which is not stated in the Constitution.

It is argued that the right to counsel implies the right to a lawyer judge who can appreciate and digest legal points made by counsel. However, the fact that one is not an attorney does not mean that one cannot comprehend legal issues. Cf. *Shadwick* v. *City of Tampa,* supra. Moreover, as thoroughly as this Court reviewed the Sixth Amendment right to counsel in *Argersinger,* supra, the Court never suggested that a non-lawyer judge was incompetent to preside over criminal matters within his court's juris-

diction. The Federal Constitution, by judicial construction, extends to a criminal defendant the right to adequate assistance of counsel. But there is nothing before this Court, other than a bald allegation, even suggesting that all non-lawyers will be unable to comprehend counsel's argument. There is nothing in this case to show that non-lawyer police judges, proportionately, convict more defendants, impose higher sentences, or are reversed more in those cases considered *de novo* in a higher court, than lawyer judges. There is no basis for any finding that non-lawyer judges are less fair and impartial in cases in which the defendant, as he is entitled, is represented by counsel who will marshal the evidence and procedure of the opposing counsel. There is nothing to show that the Due Process Clause of the Constitution *requires* judges to be lawyers rather than non-lawyers. Quoting again from our Kentucky Court of Appeals' decision in *Ditty* v. *Hampton,* supra, upon which the Court relied in deciding the present case:

> ". . . [I]t is difficult to find merit in the argument that the completely unrecognized 'right' to be tried by a lawyer judge suddenly, overnight, became *fundamental* when in *Argersinger* v. *Hamlin* a right in this country to counsel in misdemeanor cases finally was given full expression." (Emphasis in original.) 490 S.W.2d 775.

The competency of a particular presiding judge must be determined on a case by case basis whether the judge is a lawyer or a non-lawyer. The fact that a judicial error may have been committed in a single proceeding does not necessarily mean there has been a denial of due process in

all courts of the same classification. The Fourteenth Amendment does not assure immunity from judicial error. Indeed, many lawyer judges make critical errors at trial which are corrected on appeal without labeling the trial judges unconstitutionally incompetent. Cf. *Beck* v. *Washington,* 369 U.S. 541, 554, 555 (1962).

Short of the broad constitutional due process issue at work in this case, we cannot reasonably argue that errors will not occur or that the trial will always be fair in courts presided over by a non-lawyer judge. But with the two-tier system of handling misdemeanor cases in Kentucky, a defendant may find relief from a reasonable likelihood that a fair trial cannot be had or that a fair trial, in fact, was not had in a court not presided over by a lawyer judge. Cf. *Gordon* v. *Justice Court,* 525 P.2d 72 (Cal. 1074), cert. denied, 43 U.S.L.W. 3448 (U.S. Feb. 18, 1975). He has a remedy under Kentucky law.

Under Kentucky's two-tier misdemeanor court system, an accused may challenge the decision of a police court whether the judge was a lawyer or non-lawyer, by a consideration of right to the circuit court. KRS 23.032 states:

> "(1) The defendant may appeal from a judgment of a county, quarterly, justice's or police court imposing a fine or confinement, or both, to the circuit court of the county in which the judgment was rendered.
>
> "(2) The Commonwealth or city shall have no right of appeal to the circuit court from judgments of courts of inferior jurisdiction except that a city

> may appeal where the validity of an ordinance is in issue. After a decision has been rendered in the circuit court on the city's appeal either the city or the defendant may appeal from the circuit court to the Court of Appeals."

While this statutory provision denominated an application for trial *de novo* an "appeal," the right to a new trial is unconditional and exists even when a defendant seeks redetermination of questions of law. No hearing is had directly on the law as with appeals, rather a new trial in the circuit court is granted and the case is docketed like any other criminal case.

In a circuit court in Kentucky a judge is required to be a lawyer with a minimum of eight years experience in the practice of law. Kentucky Constitution, Section 130. Since this circuit court trial "shall be tried anew, as if no judgment has been rendered," Kentucky Rule of Criminal Procedure 12.06, the defendant is actually given an advantage by the presence of the police court system. If the defendant is acquitted in the police court, no more action can be taken against him, but if he is convicted, he has the right to a completely new trial in circuit court, so long as the defendant applies to the circuit court within thirty days of the entry of judgment or order in the police court. Kentucky Rule of Criminal Procedure 12.04.

It should be noted by the Court that the appellant herein did not avail himself of his right to a trial *de novo* in the Circuit Court of Harlan County, but rather chose to file a petition for habeas corpus (Appendix 4-10) attacking the constitutionality of having been adjudicated in the City of Lynch Police Court by the appellee, Judge

Russell. On remand from this Court, 95 S.Ct. 673 (1974), the Kentucky Court of Appeals, speaking through Justice Palmore, stated concerning this factor of this case:

> "Moreover, when this habeas corpus proceeding began and when it was decided in this court there was still time in which the appellant could have secured a trial *de novo* in the Harlan Circuit Court by the simple expedient of an appeal from the judgment of the Lynch Police Court. KRS 23.032; RCr 12.02 - 12.06, incl. Cf. *Colten* v. *Kentucky,* 407 U.S. 104, 112 (1972)." Appendix 66.

This Court had the occasion to take a good, long hard look at Kentucky's two-tier system of courts in the case of *Colten* v. *Kentucky,* 407 U.S. 104 (1972). As this Court pointed out in *Colten*:

> ". . . The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance." 407 U.S. 113.

Further in *Colten*, this Court stated:

> ". . . In reality his [defendant's] choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect

> is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court." 407 U.S. 119.

We do not rely on Kentucky's two-tier system of misdemeanor courts, providing for a trial *de novo* in circuit court, to clear up the alleged constitutional infirmity in the use of non-lawyer judges in police court. This is because the use of a non-lawyer judge presents no constitutional infirmity. The two-tier system of courts simply acts as a guarantee for *total* relief, not *possible* relief based on the lower court record, to any defendant who feels he has been denied in practice a fair trial in *any* police court in Kentucky, irrespective of whether the judge was a lawyer or not.

Ward v. *Monroeville,* supra, is not supportive of the appellant's claims against the *de novo* trial provision. This Court stated in *Ward,* "Petitioner is entitled to a ***neutral and detached*** judge in the first instance." (Emphasis supplied) 409 U.S. 61-62. It is clearly recognized that an individual has a constitutional and fundamental right to a fair and impartial tribunal. The trial in a mayor's court was constitutionally tainted because of the mayor's interest in collecting a fine to increase the revenue of his village. A biased judge with such an incentive to convict could not be considered to give a fair trial and we agree a trial *de novo* would not cure this constitutionally based infirmity. But there is no need to look at a trial *de novo* as a curative procedural safeguard in the non-lawyer judge situation since there has been no showing that adjudication by a non-lawyer judge is constitutionally infirm.

Therefore, in view of the fact the appellant has failed to demonstrate an identifiable probability of bias or a reasonable likelihood of denial of due process in trials presided over by non-lawyer judges, it is well to consider this Court's ruling in *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97 (1934):

> "The Commonwealth of Massachusetts is free to regulate the procedures of its court in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental [citations omitted]. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." 291 U.S. 105.

Appellees submit the fact that appellant was tried by a non-lawyer judge does not constitutionally *require* that such trials be found to inherently result in the denial of "fundamental fairness shocking to the universal sense of justice." *Kinsella* v. *United States, ex rel Singleton,* 316 U.S. 234 (1960).

B. AN INDIVIDUAL CHARGED WITH A CRIMINAL MISDEMEANOR IN A POLICE COURT WHERE THE POSSIBLE PUNISHMENT UPON CONVICTION MAY BE IMPRISONMENT, IS NOT DENIED EQUAL PROTECTION OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WHERE THE KENTUCKY GENERAL ASSEMBLY HAS ESTABLISHED DIFFERENT STATUTORY REQUIREMENTS IN ORDER TO BECOME A POLICE COURT JUDGE, DEPENDING UPON THE KENTUCKY CONSTITUTIONAL CLASS OF CITY, BASED UPON POPULATION SIZE, OVER WHICH THE POLICE COURT HAS JURISDICTION.

The appellant has claimed but failed to demonstrate that there is a "fundamental right" to have criminal misdemeanor charges tried before a judge who is a lawyer. Therefore, under the Equal Protection Clause of the Fourteenth Amendment the validity of the differing requirements for police judge, depending upon the classification of the city in which it sits, turns not upon the question of whether the differing requirements for police judge serve "a compelling state interests," but rather upon the question of whether one who attacks these differing requirements can demonstrate that these bear no reasonable or rational relationship to a legitimate state interest. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

The Kentucky General Assembly in the exercise of its legislative discretion has varied the qualifications required for police court judges, depending upon the population of the court's jurisdiction. Section 156 of the Kentucky Constitution, supra, requires cities to be classified according to population size and sets the population limitation for each class of city. The General Assembly has

required judges in police courts of first and second class cities, i.e., the most heavily populated cities, to be lawyers, KRS 26.140, 26.150, supra; while police court judges of cities of the third through the sixth classes need not be attorneys, KRS 26.170, 26.190, 26.200, supra. Appellant claims that this variance in the qualifications judges are required to meet, based upon the classification of the cities in which the judges serve, unreasonably discriminates against defendants tried before non-lawyer judges in the third through sixth classes of cities in violation of the Equal Protection Clause of the Fourteenth Amendment. We believe this claim is without merit.

Besides the appellant's failure to show any significant difference in the way in which criminal misdemeanor cases would be handled in the respective police court jurisdictions, the appellant misses the mark as to the workings of the Equal Protection Clause. The right to equal protection applies to the manner in which the law is applied to persons rather than to geographical areas. In *Salsburg* v. *Maryland*, 346 U.S. 545 (1954), this Court wrote:

> "The Equal Protection Clause relates to equality between persons as such rather than areas . . . . 'It [the Equal Protection Clause] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *State of Missouri* v. *Lewis*, 101 U.S. 22, 31. . . ." 346 U.S. 561.

See also *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

Thus, the appellant was entitled to equal protection of

the law as it is applied in Lynch, Kentucky, a city of the fifth class. The appellant's attempt to change the "persons" or "class of persons" standard to one of geography finds no support in the long judicial history of that constitutional doctrine.

In attacking the validity of the Kentucky statutory provisions, the appellant bears a heavy burden of overcoming the presumption in favor of their constitutionality. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969); *McGowan* v. *Maryland,* supra; *Salsburg* v. *Maryland,* supra; *Fay* v. *New York,* supra; *Snyder* v. *Massachusetts,* supra *Graham* v. *West Virginia,* 224 U.S. 616 (1911); *Lindsey* v. *National Carbonic Gas Co.,* 220 U.S. 61 (1910); *Missouri* v. *Lewis,* 101 U.S. 22 (1879).

In *McDonald,* in upholding the Illinois absentee ballot statutory provision which excluded inmates in state correctional facilities, this Court stated:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." 394 U.S. 809.

In *San Antonio Independent School District,* supra, this Court examined the Texas statutory scheme for financing public education. This Court wrote:

> ". . . we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. . . . A century of Supreme Court adjudication under the Equal Protection Clause "affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." 411 U.S. 39, 40.

In *Graham,* supra, this Court, upholding a multiple offender sentencing, wrote:

> "The 14th Amendment is not to be construed 'as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment.' . . . A state may make different arrangements for trials under different circumstances of even the same class of offenses. . . ." 224 U.S. 630.

Despite his assigned burden of proof, the appellant has failed completely to show that there is no legitimate state purpose for the challenged statutory provisions. This serious defect in his argument is understood because there exists very substantial legitimate purposes for the use of non-lawyer judges in our inferior criminal court system.

Appellees maintain that the statutory requirements

for police court judges within the classification of cities set forth by the Kentucky General Assembly is a reasonable method for achieving the Commonwealth's legitimate objective of providing a fair, efficient and expeditious police court system for all its citizens. The Kentucky Court of Appeals, in *Ditty* v. *Hampton,* supra, relied on by the court in its decision in this case, presented sound reasons which adequately justify the differing requirements for police court judges in the classification of cities as set forth in KRS 26.140, 26.150, 26.170, 26.190 and 26.200:

> "We can conceive of the following possible reasonable bases for the classification here in question:
>
> 1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
>
> 2. Lawyers with whom to staff the courts are more available in the larger cities.
>
> 3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. Cf. *Metcalf* v. *Howard,* 304 Ky. 498, 201 S.W.2d 197.
>
> That population and area factors may justify classifications within a court system has long been recognized. See *Missouri* v. *Lewis,* 101 U.S. 22, 25 L.Ed. 989. * * *" 490 S.W.2d 776-777.

Logic and experience does sustain the Kentucky Court of Appeals' statement that "the greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously." Police court judges in the smaller cities can operate their case load efficiently and expeditiously without being a lawyer in that the proceedings in the smaller police court will be in all likelihood conducted in a less formal manner, with less vigorous prosecution and with fewer jury trials. Moreover, police court judges in the smaller cities of Kentucky know most, if not all, of the people in the community. A police court need not hear all those cases which it has jurisdiction to hear. In many of the smaller cities, police courts hear only traffic offenses and city ordinance violations and refer the criminal cases to the appropriate quarterly or county court. All of these factors permit the smaller city police court judge to operate their court in as fair a manner without being lawyers as their big city brethren who are lawyers but do not enjoy the "luxuries" of the small town police judge.

As to the second reason stated to justify the difference in requirements for police judges in the six classes of cities in Kentucky, the greater availability of lawyers in the larger cities, the Court should know that of the one hundred twenty counties in Kentucky, there are twenty-four counties with five or less attorneys and eight counties with two or less attorneys.* But more importantly, there

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*Kentucky counties with five or less attorneys: Ballard, 5; Bath, 4; Bracken, 2; Carlisle, 2; Clinton, 4; Crittenden, 4; Cumberland, 3; Edmonson, 3; Elliott, 2; Gallatin, 4; Hancock, 4; Hickman, 3; Jackson, 2; Lee, 5; Lyon, 4; McLean, 3; Menifee, 1; Owsley, 2; Pendleton, 4; Robertson, 2; Rockcastle, 5; Spencer, 4; Trimble, 2; Wolfe, 3. Source: Kentucky and Tennessee Legal Directory, 1974, published by Legal Directories

are additional counties other than these twenty-four that have cities and towns within them that have no lawyers residing within each city's or town's jurisdiction. We need look no further than the present case background to illustrate this fact. The City of Lynch, a fifth-class city, in Harlan County, not one of those counties included in the twenty-four, has no lawyers residing in it. The City of Lynch is approximately 27 miles from the City of Harlan, a fourth class city, which is the county seat.

The appellant argues the transportation capabilities of today and the lawyer density patterns solve the problem of there being too few or no lawyers in certain remote areas in Kentucky. This is to say that the lawyers from the larger communities can shuttle to smaller communities to fill the police judge positions just as in effect must be done today to comply with the requirements of *Argersinger*, supra. But there is one looming problem with this argument. Unlike the situation involved in getting a lawyer appointed to defend an individual accused of a criminal misdemeanor, the residency of the lawyer having nothing to do with being able to defend an accused, the Kentucky Constitution and statutes require residency in the city or town in order to be a police court judge.

A police court judge is a constitutional officer in Kentucky. Section 160 of the Kentucky Constitution, supra, provides that a police judge is to be elected by the

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qualified voters of the city or town, with the proviso that police judges of the fourth, fifth and sixth class cities may be appointed as provided by law. Section 234 of the Kentucky Constitution requires officers to reside in their respective districts, counties or towns and states as follows:

> "§ 234. Officers to reside in their respective counties or towns. — All civil officers for the state at large shall reside within the state, and all district, county, city or town officers shall reside within their respective districts, counties, cities or towns, and shall keep their offices at such places therein as may be required by law."

This Court has held that each state has the power as provided by the Tenth Amendment to prescribe the qualifications of its officers and the manner in which they shall be chosen. Inherent in this is the power of the state to require its officers, e. g., police court judges, to be bona fide residents of their relevant political subdivisions. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Pope* v. *Williams*, 193 U.S. 621 (1904).

Obedient to the mandate of Section 234 of the Kentucky Constitution, KRS 26.200, supra, requires in order to be eligible to be a police court judge in a city of the fifth or sixth class, that the individual be a resident and voter of the city for a year next preceding his election or appointment. Chapter 87 of the Kentucky Revised Statutes, covering the organization and government of cities of the fifth class, specifically KRS 87.160, is also obedient to the mandate of Section 234 and states as follows:

"Except as provided in KRS 95.710 (police and fire

department), no person shall be eligible to hold any office in the city unless he is a resident and qualified voter in the city and has resided in the city for one year next preceding the date of his election or appointment. No person shall be eligible to hold the office of mayor or councilman unless he is a property holder in the city."

Note that although Section 160 of the Kentucky Constitution would permit the appointment of a police court judge in a fifth class city, KRS 87.170(1) provides in relevant part that:

> "(1) The members of the city council, mayor and police judge shall be elected by the qualified voters of the city. . . ."

This is to say the General Assembly by law has mandated that a police court judge in a city of the fifth class shall be elected by the qualified voters of the city, not appointed to the position.

You cannot compel lawyers to reside in a particular city. Moreover, in those localities where there are several lawyers, these lawyers may be unable due to a conflict of interest to assume the judicial post of police court judge.

One must also consider the effects of requiring lawyer judges in police courts because such a rigid requirement, not based upon the Federal Constitution, would have far-reaching impact on a judiciary system as we have in Kentucky, geared heavily on non-lawyer judges. In Kentucky, a county court judge, who also acts as the juvenile court judge and quarterly court judge, and county justices of

the peace are not required to be lawyers. Kentucky Constitution §§ 99, 100, 139, 140, 142.

Thus, the people of this State, through their elected representatives in the General Assembly, have provided for non-lawyer judges to serve the judicial needs of a large part of the state where otherwise those needs would be ignored. Those needs constitute a legitimate state purpose for enacting these constitutional and statutory provisions and accords with Mr. Justice Brandeis' federalism theory frequently approved by this Court that each state is free to serve as a "laboratory" for the development of sound practices consonant with the fundamental fairness doctrine. *New York State Ice Co.* v. *Liebmann,* 285 U.S. 262 (1932); Brandeis, J., dissenting.

The third factor justifying the different requirements for police court judges depending upon the classification of city, the financial resources available, is a statement of plain economics. To *require* the replacing of the non-lawyer judges with lawyers, even were they available, would be economically prohibitive. Those few lawyers that do reside in the smaller cities would not desire to impinge upon the earning capacity of their private practice to assume the burdens of a police judge position.

The laws providing for police courts and the non-lawyer judges who preside in them should not be struck down solely on the basis of speculation and innuendo completely devoid of any factual basis for their alleged constitutional invalidity. The appellant has shown nothing to cause this Court to elevate the lawyer police court judge to a constitutional right. Any disparity in the ability by smaller cities to finance a lawyer police court judge does

not violate the right to equal protection. Cf. *San Antonio Independent School District,* supra.

We submit that the differing requirements for police court judges in the six classes of cities in Kentucky is rational and reasonable and does not deny citizens of any city the right to equal protection of the laws.

In reviewing the long history of non-lawyer judges and the vital role they have played and continue to play in our judicial system, we are reminded of Mr. Justice Holmes' comment in *Jackman* v. *Rosenblaum Co.,* 260 U.S. 22, 31 (1922):

> "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the fourteenth amendment to affect it * * * *"

When it is considered that the Federal Constitution does not even require a member of this Court to be a lawyer, the more stringent qualification urged by the appellant is all the more irreconcilable. For surely the members of the lowest level of Kentucky's judiciary may not fairly be required to possess law degrees which are not demanded of members of the United States' highest tribunal.

CONCLUSION

The appellees believe the laws authorizing the use of non-lawyers as police court judges in the Commonwealth of Kentucky are well within the boundaries of due process of law. The fact that a non-lawyer is presiding in a given police court does not in itself demonstrate an equal protection violation. There is no merit in the appellant's attack

on the constitutionality of the state statutory provisions for non-lawyer police court judges. For these reasons, the appellees submit the judgment entered in the case by the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Chenoweth, one of counsel for appellees, hereby certify that the foregoing Brief for Appellees was served on appellant by depositing three copies each of same in the United States mail, first class postage prepaid, this 30 day of September 1975, addressed to counsel for appellant, HON. CHARLES E. GOSS, Central Street, Harlan, Kentucky 40831, and HON. DEAN HILL RIVKIN, 8 Sherman Street, Cambridge, Massachusetts 02138, of Counsel.

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